

Senate Natural Resources Committee

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Republican River Compact Litigation Settlement

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Mr. Chairman and members of the committee, I am David Pope, chief engineer of the Kansas Department of Agriculture's Division of Water Resources. I am here to brief you on the recent litigation settlement between Kansas, Nebraska and Colorado regarding the Republican River. I have been involved in this issue for a number of years because I represent the state on the Republican River Compact Administration.

After more than a year of intense negotiations, we reached a comprehensive settlement effective December 15, 2002, which was approved by the governors and attorneys general of the three states. Last week, the states and the Department of Justice presented the proposed settlement to the special master appointed to hear the case by the U.S. Supreme Court. During the hearing, the special master said he would recommend the settlement to the Supreme Court. However, it will not be final until it is approved by the Supreme Court, which we expect later this year. Also, much work remains to implement the settlement, which I will discuss later.

The settlement fulfills Kansas' objectives in finding an acceptable resolution of the dispute without years of litigation. Those objectives include:

1. Compact compliance by each of the states, including recognizing the impact of groundwater wells on surface flows of the basin;
2. A moratorium on new well drilling;
3. Protecting and enhancing the water supply for downstream users, including the Kansas Bostwick Irrigation District, while providing flexibility for users in the upper portion of the basin in northwest Kansas.

The settlement removes the uncertainty that is always present in litigation and it allows us to achieve compliance with the compact sooner than if we had continued litigation. While we will need

additional resources to implement the settlement and to ensure compliance by the other states, it will save millions of dollars compared to protracted litigation.

Background

In 1943, Kansas, Nebraska and Colorado entered into the Republican River Compact to equitably divide the waters of the Republican River basin. As shown on the attached map, the basin includes portions of eastern Colorado, northwest Kansas and southwest Nebraska. The main stem Republican River flows into Kansas north of Concordia and then into Milford Reservoir. Releases from Milford Reservoir join the Smoky Hill to form the Kansas River. Consequently, Kansas is both an upstream and a downstream state in this compact.

The compact allocates the basin's water supply above the Kansas-Nebraska state line, providing approximately 10 percent to Colorado, 40 percent to Kansas and 50 percent to Nebraska for beneficial consumptive use. All water that originates downstream of Nebraska is allocated to Kansas.

Historic water resources development in the basin includes a system of seven Bureau of Reclamation and two Corps of Engineers' reservoirs and six irrigation districts, along with an extensive amount of groundwater use primarily for irrigation. Kansas projects include Keith Sebelius Reservoir in Prairie Dog Creek in northwest Kansas and Milford and Lovewell reservoirs in the lower Republican River basin. Kansas also receives irrigation benefits from Harlan County Reservoir in Nebraska.

The water from the Republican River basin is important to Kansas for:

1. Water users within Republican River tributaries of northwest Kansas;
2. Surface water and groundwater users on the Republican River main stem in north-central Kansas, including the Kansas Bostwick Irrigation District;
3. Milford Reservoir users. The Republican River is a major tributary to the Kansas River and contributes to this water supply for much of our state's population.

Kansas Raises Concerns

Late in the 1980s, Kansas began raising serious concerns with Nebraska and has proposed several solutions regarding:

1. Nebraska's failure to comply with the terms of the compact, primarily due to their lack of adequate regulation of groundwater pumping and overuse of their allocation;
2. The lack of enforcement mechanisms within the compact. After many attempts to resolve the dispute through the Republican River Compact administration and

mediation, the state had no alternative but to seek relief through the U.S. Supreme Court.

Litigation

In May 1998, with the support of the Legislature through concurrent resolution, the Kansas Attorney General filed a motion for leave to file a bill of complaint with the U.S. Supreme Court alleging that Nebraska was violating the Republican River Compact. On January 19, 1999, the court granted Kansas leave to file its bill of complaint. Nebraska filed an answer and counterclaim in April 1999. Colorado also filed an answer and counterclaim. The court appointed a special master, Vincent L. McKusick, to hear the case.

Much of 1999 and 2000 was spent considering legal issues, especially whether the impact of groundwater use on stream flow is restricted by the compact. In an important ruling, the special master held that it did. During fall 2000 the special master issued a case-management order identifying a number of legal issues for resolution and setting forth an aggressive, detailed trial preparation schedule that would lead to a trial commencing March 1, 2003.

The remainder of 2000 and much of 2001 was dedicated to briefings and formal discovery. More than one million pages of documents and an extensive amount of electronic data were exchanged under discovery.

The initial rulings by the special master and court paved the way for meaningful settlement discussions. During fall 2001, the states began exploring the potential for resolving the case by settlement. During December 2001, the special master, at the request of the states, agreed to postpone the case's progression to allow the states to engage in settlement negotiations. The U.S. Department of Justice, U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers also participated in settlement negotiations.

Summary of Key Settlement Elements

1. If approved by the U.S. Supreme Court, the settlement will resolve the litigation initiated by Kansas in 1998. Each state agrees to waive all claims for damages prior to December 15, 2002.
2. A moratorium on new large-capacity wells is required in most of the basin upstream of Guide Rock, Nebraska. Kansas and Colorado must maintain their existing restrictions on new uses in the basin, which are quite restrictive.
3. The settlement requires all three states to limit their consumptive use of water, including the effect of groundwater use on stream flow, to their compact allocations as determined by the provisions of the settlement.

4. It contains detailed accounting formulas and reporting requirements for all water uses to determine compact compliance, including using a jointly developed computer model to determine the impact of all wells within the basin.
5. Each state has flexibility as to where it allows the use of water, as long as it is within its total allocation and it does not impair another state's ability to use its allocation.
6. The settlement allows multiyear averaging. However, during water-short years, the averaging period is reduced to protect downstream uses.
7. When the available water supply is limited from Harlan County Reservoir, a water-short year is deemed to exist and additional restrictions on use apply above Guide Rock, Nebraska, to protect downstream uses.
8. Nebraska is also required to protect storage releases from Harlan County Reservoir, and to curtail water rights junior to 1948 below the reservoir, during water-short years.
9. It includes procedures for mediation and arbitration to help resolve any disputes that arise. The detailed requirements related to data collection, exchange and monitoring should help avoid future disputes and improve enforcement.
10. It provides a framework where states can work together to improve operational efficiencies and the usable water supply in the lower Republican River basin.

Officials of all three states worked hard to obtain a settlement that is a fair and workable resolution of the dispute for all interests. I believe there is significant value in moving forward with the states through the compact administration to implement the settlement.

Implementation

The settlement will not end Kansas' obligations related to the Republican River Compact in terms of staff time and fiscal resources, although it will likely save millions of dollars in litigation costs. Implementing the provisions of the settlement will require:

- Completing the groundwater model this year, including arbitration if necessary, and developing in-house expertise to run the model on an ongoing basis to complete annual compact accounting with the other states.
- Monitor Kansas' water use to ensure future compliance in northwest Kansas.
- Monitor Nebraska's and Colorado's future compliance.

- Monitor Harlan County Reservoir irrigation supply and dry-year administration required by the settlement.
- Participate with Nebraska and the U.S. in a feasibility study of the alternatives identified in a value engineering study conducted by the U.S. Bureau of Reclamation. Kansas will be expected to commit to 25 percent of the total cost, either through in-kind services, cash, or some combination. Kansas' required contributions are expected to be \$125,000 in FY 05, \$125,000 in FY 06 and \$62,500 in FY 07.
- Participate in a study of the impacts of nonfederal reservoirs and land terracing on the basin's virgin water supply. I expect Kansas' participation in this study to be provided through in-kind services.
- Being prepared to use arbitration or other means to resolve any future disputes under the dispute resolution provisions of the settlement.

Conclusion

I am convinced that the settlement is a reasonable solution that meets our original objectives while avoiding the uncertainty, time and expense of protracted litigation. A detailed summary of the settlement agreement is attached to my testimony. I would be glad to answer your questions regarding this matter. Thank you.

Attachments: Basin Map
Settlement Summary

Summary of the Republican River Settlement Agreement - December 15, 2002

Following is a brief description of the major components of the final settlement stipulation agreed to by Kansas, Colorado and Nebraska.

Section I - General Provisions - Resolution of Pending Litigation

The settlement resolves the pending litigation and disputes between the states and provides for dismissal with prejudice of the original action. This means all claims arising prior to December 15, 2002, that could be made against another state, including any claims for damages, are waived.

Section II - Definitions

Section III - Existing Development

The states agreed that a moratorium would be placed on the construction of new wells upstream of Guide Rock, Nebraska. Kansas' and Colorado's existing rules, which create a de facto moratorium, were accepted as sufficient for this purpose. Nebraska was required to develop a moratorium that generally applies to the three Republican River Natural Resources Districts (NRDs).

Section IV - Compact Accounting

The settlement adopts clear, detailed accounting formulas to determine whether each state is limiting its consumptive uses of the basin's water supply to its allocation under the compact. Major aspects of the accounting procedures include methods to determine depletions from surface water and groundwater use; subbasin flexibility; averaging; and measurement and data collection.

Determining Depletions: The settlement requires states to use a comprehensive groundwater model, currently being developed by the three states, to determine the impact of all groundwater pumping on the basin's stream flows.

Subbasin Flexibility: The settlement provides each state with flexibility for the location of their use of water, as long as the state's total use is within its allocation and its use does not impair the ability of a downstream state to use its specific allocation. Based on historic use, this should give Kansas sufficient flexibility to continue existing uses in northwest Kansas, except under very rare conditions when some moderate regulation may be required.

Averaging: The settlement agreement provides that compact accounting and compliance will be done on a five-year rolling average, except, as is discussed below, in water-short years when a two- or three-year average will be used to protect Kansas' needs in the lower basin. Thus, these provisions provide all the states, including Kansas, with needed flexibility to use water to the extent it is consistent with compact allocations, balanced by the need to protect downstream uses in critical periods.

Measurement and Data Collection: RRCA accounting procedures describe the measurements to be made, data to be compiled, format of reports, and the deadline by which reports must be submitted to the RRCA engineering committee.

During negotiations, the states and the United States discussed the possibility of working together to improve the water supply to the lower river, including the Kansas Bostwick Irrigation District and main stem Republican River in Kansas. The Bureau of Reclamation, with some technical assistance from the states, evaluated on a limited basis 13 alternatives. The bureau is initiating an appraisal study of three alternatives the states believe are most feasible. It is possible that the states and the bureau may elect to pursue authorization and funding of one or more of these alternatives to better utilize and manage the waters of the lower Republican River basin.

Section V entitled Guide Rock discusses administration in a water-short year.

The compact provides that Kansas may take all or a portion of its allocation for the main stem at or near Guide Rock, Nebraska. The settlement provides for additional water administration in Nebraska above Guide Rock, particularly during water-short years. Nebraska has agreed to recognize a priority date of February 26, 1948, for the Kansas Bostwick Irrigation District and to protect any storage water released from Harlan County Lake from diversions by those without a contract for the water.

When the U.S. Bureau of Reclamation forecasts an irrigation water supply in Harlan County Lake of less than 130,000 acre feet (the water supply available to the Bostwick Irrigation District when Harlan County Reservoir is full), and water is needed for irrigation at Guide Rock, Nebraska will close permits between Harlan County Lake and Guide Rock that are junior to February 26, 1948.

When the irrigation supply is less than 119,000 acre feet (known as water-short year administration), Nebraska has agreed to further limit its computed beneficial consumptive use above Guide Rock to no more than the amount of its allocation derived above Guide Rock. This will be calculated using a two-year average rather than the five-year average generally used under the compact accounting

The settlement provides for an alternative to the two-year running average compliance schedule in water-short year administration if Nebraska elects to implement a pre-approved plan for reducing its uses above Guide Rock. In such cases, its compliance above Guide Rock will be based on a three-year running average.

Section VI - Soil and Water Conservation

To address federal government concerns regarding depletions due to conservation practices, the states have agreed to count evaporation from nonfederal reservoirs larger than 15 acre feet and, in cooperation with the United States, to undertake a study to assess the impacts of nonfederal reservoirs and land terracing on the basin water supply. The cost of the study is to be no more than \$1 million. The federal government will pay for 75 percent of the study and each state agrees to pay their share of the remaining 25 percent. The states' shares may be paid entirely by in-kind contributions.

Participation in the study does not commit any state to include soil and water conservation measures in the compact accounting.

Section VII - Dispute Resolution

The settlement provides clear mechanisms to resolve future disputes among the states. Any disputes related to the compact will be submitted first to the compact administration. If the state raising the issue believes it requires immediate attention, it must be addressed by the compact administration within 30 days. Any issue that cannot be resolved by the compact administration will be submitted to nonbinding arbitration, unless otherwise agreed to by the states. If arbitration does not resolve the dispute, the state may seek relief from the U.S. Supreme Court.

We believe this dispute resolution process, when combined with the extensive detail negotiated in the settlement and the cooperative atmosphere established in the settlement discussions, will minimize future disputes that must go before the court for resolution.

As the details of the settlement will be a decree of the U.S. Supreme Court, breaches of its expressed provisions will be more easily demonstrated than under the compact itself. Also, it will have serious consequences for the states and the officials who allow such breaches to occur.

The text of the settlement agreement and other background information can be found on the department's website at: www.accesskansas.org/kda.